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82-1668

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

OCTOBER TERM 1982

The Town of Atlantic Beach,

Plaintiff

vs.

Cecelia Young,

Defendant.

On Appeal From The Supreme Court
of North Carolina

JURISDICTIONAL STATEMENT

Neil B. Whitford, Esq.
Counsel for Cecelia Young
Defendant-Appellant
Cooper and Whitford
Attorneys At Law
P. O. Box 99
Atlantic Beach, N. C. 28512
(919) 726-2865

QUESTIONS PRESENTED BY THE APPEAL

1. Did the Supreme Court of North Carolina err as a matter of law in finding that the animal control ordinance for the Town of Atlantic Beach as applied to the appellant does not violate her rights guaranteed by the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and

2. Did the Supreme Court of North Carolina err as a matter of law in finding that the animal control ordinance for the Town of Atlantic Beach as applied to the appellant does not violate her rights guaranteed by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America.

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REFERENCE TO REPORTS OF OPINIONS DELIVERED
IN THE STATE COURTS

Town of Atlantic Beach v Cecelia Young,
58 N. C. App. 597, 293 S. E. 2d 821,
Reversed, 306 N. C. 752, 295 S.E. 2d 764 (1983)

STATEMENT OF GROUNDS OF JURISDICTION

This proceeding originated as a suit in equity by the Town of Atlantic Beach against Cecelia Young for a mandatory injunction requiring Mrs. Young to conform to an animal control ordinance adopted by said Town pursuant to a general delegation of authority to municipal corporations in North Carolina General Statutes, Section 160A-186, and North Carolina General Statute, Section 160A-174. The Trial Court (Superior Court) entered Summary Judgment in favor of Mrs. Young which Judgment was affirmed by the North Carolina Court of Appeals. The Supreme Court of North Carolina reversed by Opinion filed January 11, 1983. The Supreme Court of North Carolina is the highest Court of the State in which a decision in the matter could be had.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(2) because the

decision of the Supreme Court of North Carolina is in favor of the validity of a State statute (ordinanace) and against a claim of substantial federal constitutional rights.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

A. Constitutional Provisions:

Amendment V, Constitution of the United States of America.

> "No person shall...be deprived of life, liberty, or property, without due process of law;..."

Amendment XIV, Constitution of the United States of America. Section 1.

> "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. Statutes:

North Carolina General Statute, Section 160-174(a).

> "A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of

its citizens and the peace and dignity of the city, and may define and abate nuisances."

North Carolina General Statute, Section 160A-186.

"A city may by ordinance regulate, restrict, or prohibit the keeping, running, or going at large of any domestic animals, including dogs and cats. The ordinance may provide that animals allowed to run at large in violation of the ordinance may be seized and sold or destroyed after reasonable efforts to notify their owner."

C. Ordinance Of The Town of Atlantic Beach:

"Be it ordained by the Board of Commissioners and Mayor of the Town of Atlantic Beach, N. C., sitting in Special Session on the 26th day of July, 1979, that

Whereas, it is deemed that the keeping of livestock, animals, and poultry within the city limits of the town is not consistent with the public health, safety and welfare, and indeed poses threats to both; then

It shall be unlawful for any person, firm or corporation to keep, within the town limits, livestock, animals or poultry other than house pets. This prohibition shall be interpreted to include horses, cows, goats, sheep, chickens and turkeys, but this list is

not to be deemed all inclusive.

This ordinance is to become effective on the 26th day of August, 1979.

STATEMENT OF THE CASE

Prior to January 1, 1978, defendant-appellant, Cecelia Young, resided in an unincorporated area where she maintained two goats. Effective January 1, 1978 the Town of Atlantic Beach, North Carolina, annexed Mrs. Young's premises along with other areas. Thereafter, she acquired a pony which she also kept at her premises. Thereafter, on July 26, 1979, the Town of Atlantic Beach enacted an ordinance making it unlawful "for any person, firm or corporation to keep, within the town limits, livestock, animals, or poultry other than house pets." The ordinance went on to say that "this prohibition shall be interpreted to include horses, cows, goats, sheep, chickens and turkeys, but this list is not to be deemed all inclusive."

Thereafter, the Town of Atlantic Beach filed suit to have the defendant-appellant enjoined from maintaining the goats and pony on

her premises. In answering the plaintiff-appellee's complaint, the defendant did allege that the ordinance in question was unconstitutional for reasons of inconsistency with the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and also was inconsistent with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

At a hearing on the defendant's Motion for Summary Judgment, which Motion was based in part on the unconstitutionality of the ordinance Summary Judgment was granted for the defendant-appellant, and the the plaintiff's complaint was dismissed.

The Town of Atlantic Beach appealed to the North Carolina Court of Appeals. There, by brief, the defendant-appellant again argued that the ordinance violated principles of

Federal Constitutional Law and was thus invalid. However, the Court of Appeals in affirming the Trial Court based its decision on factual and procedural grounds and specifically avoided the Constitutional questions.

The Town of Atlantic Beach then petitioned the Supreme Court of North Carolina for discretionary review. Review was granted and the North Carolina Supreme Court reversed. In the Supreme Court, the defendant-appellant again by written brief and oral argument strongly maintained that the ordinance in question was invalid by reason of inconsistency with the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States of America. However, the State Supreme Court in addressing the Federal Constitutional questions found that the ordinance did not deny the defendant's guaranteed rights.

STATEMENT OF SUBSTANTIAL QUESTION

Domestic animals are regarded as property in the United States. C.J.S., Vol. 3A, Animals, Section 4. Legislative regulation whether by municipalities, counties, or states, is widespread. However, as a general matter, there have been no guidelines established by the federal judiciary with respect to proper controls tempered with constitutional guarantees on the fundamental property right of animal ownership. A determination of this issue by the Court will be of great benefit to legislative bodies and animal owners across the nation.

As a citizen of the United States, Cecelia Young is entitled to protection of the Constitution. The state's highest court has ruled that the Town's restriction on her right of ownership and possession of certain animals does not violate property rights guaranteed in

the Fifth and Fourteenth Amendments to the United States Constitution. However, a reading of the ordinance in question clearly demonstrates that the regulatory scheme on its face is vague, arbitrary, unreasonable, and discriminates between citizens within the same classification, to wit: animal owners.

It is vague because a reasonable person cannot know if all housepets are permitted or not. The courts of North Carolina could not agree on this issue which in itself emphasizes the vice of vagueness. Also this vagueness tends to chill legitimate property rights of Mrs. Young and any citizen who chooses to have harmless housepets that are not approved for aesthetic reasons by either the town board or the official charged with enforcing the ordinance

The ordinance is arbitrary, unreasonable, and discrimatory because under the guise of health and welfare some animals are allowed while others are not notwithstanding that ani-

mal science proves conclusively that many animals prohibited present no more of a health hazard than those allowed and some cases present less of hazard.

Finally, by proscribing certain animals based on the supposition that all animals present health hazards, when the opposite is true, the defendant-appellant is denied property without due process of law.

Full argument of the case should result in specific guidelines for regulation by legislative bodies of use and ownership of this type of property.

APPENDIX

IN THE SUPREME COURT OF NORTH CAROLINA

TOWN OF ATLANTIC BACH

v

No. 516PA82
Carteret

CECELIA YOUNG

Appeal by plaintiff pursuant to G. S. 7A-31 for discretionary review of the decision of the Court of Appeals (Judge Whichard, with Judges Robert Martin and Harry C. Martin (now Justice) concurring) reported at 58 N. C. App. 597, 293 S.E. 2d 821 (1982). The Court of Appeals affirmed the grant of defendant's motion for summary judgment and the denial of plaintiff's motion for summary judgment entered by Rouse, J., on 1 June 1981 in Superior Court, Carteret County.

Prior to 1 January 1978 defendant, Cecelia Young, lived in the Ocean Ridge Subdivision of

Carteret County, North Carolina. On 1 January 1978 the Town of Atlantic Beach annexed some property contiguious with its western border. Within this annexed area is the land on which defendant resides. Prior to the annexation ordinance being passed and up to the present time defendant has maintained livestock upon the premises on which she resides. At the present time she maintains two goats and one small pony.

Approximately eighteen months after the effective date of the annexation ordinance the Town of Atlantic Beach enacted an ordinance which prohibits the keeping of animals, livestock and poultry within the city limits with an exception provided for house pets. The ordinance in part provides:

> Whereas it is deemed that the keeping of livestock, animals, and poultry within the city limits of the town is not consistent with the public health, safety and welfare, and indeed poses threats to both; then

> It shall be unlawful for any person, firm, or corporation to keep, within the town limits, livestock, animals or poultry other than house pets. This prohibition shall be interpreted to include horses, cows, goats, sheep, chickens and turkeys, but this list is not to be deemed all inclusive.

The ordinance prohibiting the keeping of animals, livestock and poultry was passed on 26 July 1979 and became effective on 26 August 1979. The town of Atlantic Beach brought this action on 8 October 1980, more than a year after the effective date of the ordinance, seeking a permanent injunction against defendant directing her to remove all animals other than house pets.

Defendant maintains now as she did then that her two goats and one pony are house pets within the meaning of the ordinance and that her pets present no greater threat to the health and welfare of the town of Atlantic Beach than any other house pet. In support of her contention plaintiff presented affidavits

of two local doctors of veterinary medicine and the sanitation supervisor for Carteret County, all of whom stated that defendant's animals did not constitute a health hazard.

In late April, 1981, after discovery was completed both plaintiff and defendant moved pursuant to Rule 56 of the Rules of Civil Procedure for summary judgment. The motions were heard in the Superior Court of Carteret County by Judge Robert Rouse on 29 April 1981. On 1 June 1981 Judge Rouse ordered that plaintiff's motion for summary judgment be denied and that defendant's motion for summary judgment be granted.

The plaintiff then appealed to the North Carolina Court of Appeals which affirmed the judgment of Judge Rouse in an opinion filed 3 August 1982. Pursuant to G.S. 7A-31 plaintiff petitioned for discretionary review by this Court. The Petition was allowed 5 October 1982.

MASON and PHILLIPS, P.A. by L. Patten Mason, for plaintiff-appellant.

COOPER and WHITFORD, by NEIL B. WHITFORD for defenant-appellee.

COPELAND, Justice

The plaintiff-appellant, Town of Atlantic Beach, raises one question for consideration by this Court. Did the trial court and the Court of Appeals err in allowing defendant-appellee's motion for summary judgment while denying plaintiff-appellant's motion for summary judgment? We believe that the trial court and the Court of Appeals misconstrued the clear meaning of the language of the ordinance in question and summary judgment should have been entered for the plaintiff pursuant to its motion under Rule 56 of the Rules of Civil Procedure.

In affirming the trial court's granting of defendant's motion for summary judgment, the

Court of Appeals concentrated its discussion on the question of whether or not the two goats and one pony owned by the defendant were house pets. Such emphasis is misplaced and leads to a result which is contra to the intent of the ordinance as a whole. Whether the goats and pony are house pets is not the central issue in this case. Rather the focus is whether the two goats and one pony are prohibited under the ordinance. The language of the ordinance clearly states that goats and horses are prohibited. "This prohibition shall be interpreted to include horses, cows, goats, sheep, chickens and turkeys, but this list is not to be deemed all inclusive." (Emphasis added.) Without the above quoted sentence, the ordinance would arguably allow the keeping of ponies or goats within the city limits as house pets, if they could be shown to be house pets. However, the final sentence of the ordinance makes it clear that the prohibition is intended to include horses and goats.

Defendant contends that the final sentence does nothing more than define livestock and poultry and is therefore little more than surplusage. We cannot agree with the defendant's interpretation of the ordinance in question. The rules applicable to the construction of statutes apply equally to the construction and interpretation of municipal ordinances.

Perrell v. Beaty Service Co., Inc., 248 N.C. 153, 102 S.E. 2d 785 (1958). "In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant if they can reasonably be considered as adding something to the act...." State v Harvey, 281 N.C. 1, 19, 187 S.E. 2d 706, 718 (1972). In re Watson 273 N.C. 629, 161 S.E. 2d 1 (1968).

We believe that this ordinance must be

read as a whole with each of its provisions given a full interpretation. The ordinance states that it is "unlawful...to keep, within the town limits, livestock, animals or poultry...." This language unquestionably creates a prohibition against the keeping of various animals within the town's limits. Howver, the ordinance carves out an exception to the prohibition by allowing the keeping of house pets. After carving out this exception, the ordinance further provides that the prohibition, not the exception, "shall be interpreted to include horses, cows, goats, sheep, chickens and turkeys...." The language of this ordinance clearly provides that although there may be an exception for house pets, certain animals such as horses and goats will not be permitted even within the exception. "Where the language of a statute or ordinance is clear and its meaning unmistakable, there is no room for construction...." State v Norfolk Southern Railroad Company, 168

N.C. 103, 109, 82 S.E. 963, 966 (1914); Perrell v Beaty Service Co., Inc., 248 N.C. 253, 102 S.E. 2d 785 (1958).

The language of the ordinance prohibiting the keeping of animals, livestock and poultry is clear. The keeping of goats and ponies within the town limits of Atlantic Beach is prohibited. As a result, summary judgment should have been denied the defendant and granted to the plaintiff.

Defendant-appellee contends as she did before the Court of Appeals that the ordinance prohibiting the keeping of animals, livestock and poultry within the town limits of Atlantic Beach is constitutionally invalid. Defendant maintains that the ordinance in question is in violation of the due process and equal protection clauses of the United States Constitution as well as Article 1, Sections 1 and 19 of the Constitution of the State of North Carolina.

We will address each of these challenges individually.

Before considering defendant's constitutional challenges to the ordinance, we point out that in order to raise constitutional claims against a municipal ordinance the defendant must produce evidence that she has sustained or is in immediate danger of sustaining a direct injury as a result of the ordinance. Nicholson v Education Assistance Authority, 275 N.C. 439, 268 S.E. 2d 401 (1969). Even if the defendant has standing to raise constitutional challenges, the burden of establishing the unconstitutionality of an ordinance is upon him who assails it. Schloss v Jamison, 262 N.C. 108, 136 S.E. 2d 691 (1964). The party challenging the constitutionality of an ordinance must provide the court with more than mere accusations, for the court, in its construction, will do everything possible to uphold the constitutionality of the

ordinance. Victory Cab Co., Inc. v Shaw, 232 N.C. 138, 59 S.E. 2d 573 (1950).

Defendant-appellee first contends that the ordinance is unconstitutionally vague in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. We find no merit in defendant's challenge. As stated above the language of the ordinance unquestionably prohibits the keeping of horses and goats within the town limits of Atlantic Beach. Since defendant's claim only concerns two goats and one pony there is no doubt that she was put on notice of any violation since the ordinance expressly prohibits the keeping of horses and goats. Although defendant goes beyond the facts of ths case in order to support her contentions, we emphasize that this Court, "will not undertake to pass upon the validity of the statute [or ordinance] as it may be applied to

factual stiuations materially different from that before it." Watch Co. v Brand Distributors and Watch Co. v Motor Market, Inc., 185 N. C. 467, 472, 206 S.E. 2d 141, 145 (1974).

Defendant-appellee also challenges the validity of this ordinance on the grounds that it is arbitrary and unreasonable in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Once again we find no merit in defendant's claim.

The legislature has granted to municipal corporations like Atlantic Beach the power to regulate domestic animals within its corporate limits. G.S. 160A-186 provides:

> A city may by ordinance regulate, restrict or prohibit the keeping, running or going at large of any domestic animals, including dogs and cats.

In addition the legislature has provided in

G.S. 160A-174 that, "A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety or welfare of its citizens..." Through G.S. 160A-174 and G.S. 160A-186 the legislature has delegated to the Town of Atlantic Beach a part of its police power which may be exercised "to protect or promote the health, morals, order, safety and general welfare of society". State v Warren, 252 N.C. 690, 694, 114 S.E. 2d 660, 664 (1960); S.S. Kresge Co. v Tomlinson and Arlan's Dept. Store v. Tomlinson, 275 N.C. 1, 165 S.E 2d 236 (1968). The Town of Atlantic Beach passed the ordinance in question pursuant to its police power as provided under G.S. 160A-186 and expressly stated that its purpose is to protect the health, safety and welfare of the citizens of Atlantic Beach.

In reviewing the validity of this ordinance this Court will look to see if the police power

has been exercised within the constitutional limitations imposed by both the state and federal constitutions. City of Raleigh v. Norfolk Southern Railway Co., 275 N.C. 454, 168 S.E. 2d 289 (1969). This review will not include an analysis of the motives which prompted the passage of this ordinance because, "so long as an act is not forbidden, the wisdom of the enactment is exclusively a legislative decisions." Mitchell v Financing Authority, 273 N.C. 137, 144, 159 S.E. 2d 745, 750 (1968); S. S. Kresge Co. v. Tomlinson and Arlan's Dept. Store v. Tomlinson, 275 N. C. 1, 165 S.E. 2d 236 (1968).

In order to determine whether this ordinance is unconstitutionally arbitrary and unreasonable we look to see if the ordinance is reasonably related to the accomplishment of a legitimate state objective. Raleigh Mobile Home Sales, Inc. v Tomlinson, 276 N.C. 661, 174 S.E. 2d 542 (1970); State v Whitaker, 228 N.C.

352, 45 S.E. 2d 860 (1947). We note that the mere assertion within the ordinance that it is for the public welfare is not enough in and of itself to bring the ordinance within a valid exercise of police power. MacRae v City of Fayetteville, 198 N.C. 51, 150 S.E. 810 (1929). However, there is no question that the health and welfare of the citizens of this state are legitimate public purposes. We are therefore left the determination of whether the means employed, to-wit the contested ordinance, is reasonably related to the health and welfare of this state's citizens.

This Court has previously held that it is within the police power to regulate the keeping of cattle within the city limits of Charlotte. State v Stowe, 190 N.C. 79, 128 S.E. 481 (1925). In this case we have no difficulty in finding on the face of this ordinance that prohibiting the keeping of animals other than house pets is reasonably related to the health

and welfare of the citizens of the Town of Atlantic Beach. "In the exercise of an unquestioned police power much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with, unless they are manifestly unreasonable and oppressive." State v Stowe, 190 N.C. 79, 80-1, 128 S.E. 481, 482 (1925). We find nothing arbitrary, unreasonable or oppressive about this ordinance.

Defendant appellee also challenges the ordinance of Atlantic Beach on the grounds that it violates the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, Sections 1 and 19 of the North Carolina Constitution. There is no doubt that the police power as exercised by the Town of Atlantic Beach is subordinate to the equal protection guarantees of the federal and state constitutions. State v Scoggin, 236 N.C. 1, 72 S.E. 2d 97 (1952); Zopfi v City of

Wilmington, 273 N.C. 430, 160 S.E. 2d 325 (1968). However, one of the basic principles involved in considering the validity of legislation assailed under equality provisions is that the state enjoys a wide range of discretion. State v Davis, 157 N.C. 648, 73 S.E. 130 (1911).

Whenever a statute or ordinance is challenged as a violation of equal protection guarantees, the first determination to be made by a court is what standard of review will be used to decide constitutionality. "Traditionally, courts employ a two-tiered scheme of analysis...." Texfi Industries, Inc., v City of Fayetteville, 301 N.C. 1, 10, 269 S.E., 2d 142, 149 (1980). The first tier of review requires "strict scrutiny" in which the government must demonstrate that its action is necessary to promote a compelling state interest. Memorial Hospital v Maricopa County, 415 U.S., 250, 39 L. Ed. 2d 306, 94 S.

Ct. 1076 (1974). The second tier of review simply requires that the contested ordinance bear some rational relationship to a legitimate state interest. New Orleans v Dukes, 427 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976). "When an equal protection claim does not involve a 'suspect class' or a fundamental right, the lower tier of equal protection analysis is employed." Texfi Industries, Inc. v City of Fayetteville, 301 N.C. 1, 11, 269 S.E. 2d 142, 149 (1980).

We believe that the defendant does not fall within a suspect classification nor do we feel that the right to keep two goats and one pony in a house within a town's corporate limits is a fundamental right. We therefore will review this ordinance under the lower tier analysis. As indicated within this opinion the health and welfare of the citizens of this state is a legitimate state interest. In addition, a prohibition against animals, other than

house pets, within a town's corporate limits is rationally related to such a legitimate state concern. As a result we find that the ordinance passed by the town of Atlantic Beach does not violate the equal protection rights guaranteed under the state and federal constitutions.

Defendant-appellee also challenges the validity of this ordinance on the basis that it ws enacted under improper procedures since one vote was cast over the phone. We find no support for this contention in the record or briefs in this case. We must conclude that the ordinance was enacted within the guidelines established by the legislature and the Town of Atlantic Beach.

We therefore hold that the opinion of the Court of Appeals is reversed and this case remanded to that Court for a remand to Superior Court of Carteret County for summary judgment to

be entered for the plaintiff, Town of Atlantic Beach.

REVERSED AND REMANDED.

Justice Martin took no part in the consideration or decision of this case.

COURT OF APPEALS NORTH CAROLINA

TOWNOF ATLANTIC BEACH v. CECELIA YOUNG

No. 813SC828

(Filed 3 August 1982)

APPEAL by plaintiff from Rouse, Judge. Judgment entered 1 June 1981 in Superior Court, CARTERET County. Heard in the Court of Appeals 1 April 1982.

Hamilton, Bailey & Coyne, by Glenn B. Bailey, for plaintiff appellant.

Cooper and Whitford, P.A., by Neil B. Whitford, for defendant appellee.

WHICHARD, Judge.

I.

Plaintiff municipality enacted an ordinance which prohibited the keeping "within the town limits [of] livestock, animals, or poultry other than house pets." The ordinance specified that is prohibition included,, inter

alia, horses and goats.

Defendant, in response to plaintiff's request for admission, acknowledged that she kept two goats and one pony on her premises. While she denied that her premises were within plaintiff's town limits, the only record evidence was to the contrary.

By this action plaintiff sought, pursuant to the above ordinance, a permanent injunction "directing defendant to remove all animals other than specified domestic house pets from her premises." The trial court denied plaintiff's motion for summary jugment, and granted defendant's.

Plaintiff appeals.

II.

One ground for defendant's motion for summary judgment was:

> The animals the defendant keeps on her premises, according to the affidavit attached hereto, are house pets which are permitted under the Town Ordinance. The

> plaintiff does not allege in its Complaint that the animals are not house pets, and no discovery has indicated they are anything other than house pets.

Whether defendant's animals are "house pets" requires two determinations: (1) the legal question of the meaning of "house pets" as used in this ordinance, and (2) the specific facts which invoke application of this legal definition.

Absent, evidence of a contrary intent, the words of an ordinance are presumed to have their common and ordinary meaning. See Transportation Service v. County of Robeson, 283 N.C. 494, 500, 196 S.E. 2d 770, 774 (1973); In Re Trucking Co., 281 N.C. 242, 252, 188 S.E. 2d 452, 458 (1972). The common meaning of "pet" is "a domesticated animal kept for pleasure rather than utility." Webster's International Dictionary 1689 (3d ed. 1968). We thus construe the exception in the ordinance for "house pets" to encompass all domesticated animals kept for pleasure in or around a house.

The facts material to the determination whether defendant's animals are "house pets" are the following: (1) the kind of animals they are, (2) the reason for which they were kept, and (3) the place where they were kept. Defendant has shown by affidavit that (1) her animals are two goats and a pony, which we find are "domesticated" animals, i.e., ones that "live and breed in a tame condition," Webster's supra, at 671; (2) they are kept as "pets" and thus are for pleasure rather than utility; and (3) they are kept within the walls of her house.

G.S. 1A-1, Rule 56(e), in part provides:

> When a motion for summary judgment is made and supported as provided in this rule [i.e., by pleadings, depositions, answers to interrogatories, admissions on file, or affidavits], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Defendant demonstrated the facts necessary to make the legal determination that her animals were "house pets" within the meaning of the ordinance. Plaintiff then had the burden to respond, by affidavit or other evidentiary matter, to show contrary material facts, and that there thus was a genuine issue for trial. "If the moving party files papers,including testimonial affiavits which show there is not a triable issue, the opposing party pursuant to Rule 56(e) and (f) must file papers which show there is a triable issue or the moving party will be entitled to summary judgment." Nye v. Lipton, 50 N.C. App. 224, 227, 273 S.E. 2d 313, 315, disc. rev. denied, 302 N.C. 630, 280 S.E. 2d 441 (1981). See also Real Estate Trust v. Debnam, 299 N.C. 510, 513, 263 S.E. 2d 595, 598 (1980); Kidd v. Early, 289 N.C. 343, 365, 222 S.E. 2d 392, 407 (1976); City of Elizabeth City v. Enterprises, Inc. 48 N.C. App. 408, 412, 269 S.E. 2d 260, 262, (1980); Arnold v.

Howard, 29 N.C. App. 570, 572, 225 S.E. 2d 149, 151 (1976); Pridgen v. Hughes, 9 N.C. App. 635, 640, 177 S.E. 2d 425, 428 (1970).

Plaintiff failed to offer any evidentiary matter in opposition to defendant's affidavit. There thus was no genuine issue for trial. A motion for summary judgment must be granted where "there is no genuine issue as to any material fact and...any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). By applying the legal definition of "house pets" as used in the ordinance to the undisputed facts, we hold that defendant's animals fell within the ordinance's exception for "house pets," and that defendant thus was entitled tojudgment as a matter of law.

III.

Defendant's motion also sought summary judgment on the basis that plaintiff's ordinance is unconstitutional on several

grounds. "It is an established principle of appellate review that [the] court will refrain from deciding constitutional questions when there is an alternative ground available upon which the case may properly be decided." Brooks, Comr. of Labor v. Enterprises, Inc. 298 N. C. 759, 761, 260 S.E. 2d 419, 421 (1979). See also State v. School, 299 N.C. 351, 359, 261 S.E. 2d 908, 914, appeal dismissed, 449 U.S. 807, 66 L. Ed. 2d 11, 101 S. Ct. 55 (1980). Having concluded that defendant's motion for summary judgment was properly granted because plaintiff offered no responsive forecast of evidence which established existence of a genuine issue of fact and that defendant was entitled to judgment as a matter of law, we refrain from passing on the constitutional questions presented.

IV.

In part, this is a case about goats. When confronted with cases concerning various species of the animal kingdom, appellate courts

of this jurisidiction historically have yielded to a seemingly inexorable compulsion to write learned (?) treatises thereon. See e.g., Justice Brogden's opinon on mules, Rector v. Coal Co., 192 N.C. 804, 806, 136 S.E. 113, 114 (1926) ("A mule is a meloncholy creature...[which] has neither 'pride of ancestry nor hope of posterity.'"); and Judge (Harry C.) Martin's[1] opinion on dogs, State v. Wallace, 49 N.C. App. 475, 477, 271 S.E. 2d 760, 762 (1980) ("The dog is of a noble, free nature, yet is domesticated and dedicated to the well-being of people of all races.")

In the exercise of judicial restraint, attained with difficulty, we resist the temptation presented here to follow, with regard to goats, the example of these opinions. Reference is made, however, to the following:

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[1]·As of the filing date of this opinion Justice Harry C. Martin.

J. Scott, The Book of the Goat (1979); and V. Sussman, Never Kiss a Goat on the Lips (1981).

V.

Plaintiff commenced this action for the purpose of getting defendant's goats. Defendant's obtaining a summary judgment against plaintiff may, instead, get plaintiff's goat.

We hold the grant of defendant's motion for summary judgment proper. Denial of plaintiff's motion for summary judgment therefore was equally proper. Plaintiff's assignment of error to the grant of defendant's motion and the denial of its motion is overruled, and the judgment is

Affirmed.

Judges MARTIN (Roibert M.) and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF CARTERET SUPERIOR COURT DIVISION

80 CvS 667

TOWN OF ATLANTIC BEACH,

Plaintiff

vs. J U D G M E N T

CECELIA YOUNG,

Defendant.

THIS CAUSE was before the undersigned Judge Presiding on April 29, 1981 for hearing on Motion of Plaintiff for Summary Judgment and Motion of Defendant for Dismissal and Summary Judgment. After hearing oral arguments the Court allowed additional time to file briefs and it was agreed by counsel that the Court could enter Judgment out of County. The Court has considered oral arguments, record, exhibits and briefs.

IT IS, ORDERED AND ADJUDGED that Plaintiff's Motion for Sumary Judgment is denied. That Defendant's Motion for Summary Judgment is granted and Plaintiff's Complaint is dismissed. That the costs of this action be taxed against the Plaintiff.

THIS, the 1st day of June, 1981.

S/ Robert D. Rouse, Jr.
Robert D. Rouse, Jr.
Superior Court Judge

To the foregoing Judgment, the Plaintiffs except and give notice of appeal to the North Carolina Court of Appeals. The appeal bond is hereby set at Two Hundred ($200.00) Dollars and it is further directed that the plaintiffs will have ninety (90) days to prepare and serve upon the Defendant the case on appeal. The Defendant shall have, following service of said case on appeal, thirty (30) days in which to serve countercase or exceptions.

This 1st day of June, 1981.

S/ Robert D. Rouse, Jr.
Robert D. Rouse, Jr.

(Filed April 7, 1983 at 11:44 A. M.)

IN THE SUPREME COURT OF NORTH CAROLINA

Town of Atlantic Beach,

Plaintiff

vs. No. 516PA82-Carteret

Cecelia Young,

Defendant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Cecelia Young, the defendant above named, hereby appeals to the Supreme Court of the United Staes from the final Judgment of the Supreme Court of the State of North Carolina reversing the Judgment of the Court of Appeals of the State of North Carodlina, entered in this action on January 11, 1983.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

This 6th day of April, 1983.

Cooper and Whitford
Attorneys for
Defendant-Appellant

by: S/
Neil B. Whitford
P. O. Box 99
Atlantic Beach, N. C. 28512
Telephone: (919) 726-2865

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading in the manner prescribed by Rule 5 of the Rules of Civil Procedure by depositing in the United States Mail, with adequate postage thereon, a copy of same in an envelope addressed as follows:

L. Patten Mason, Esq.
Mason & Phillips, P. A.
Attorneys At Law
1210 Arendell Street
Morehead City, N. C. 28557

This 6th day of April, 1983.

S/ Neil B. Whitford
Neil B. Whitford

IDENTIFICATION OF COUNSEL

For the defendant-appellant:

Neil B. Whitford, Esq.
Cooper and Whitford
Attorneys At Law
P. O. Box 99
Atlantic Beach, N. C. 28512
Telephone (919) 726-2865

For the plaintiff-appellee:

L. Patten Mason, Esq.
Mason & Phillips, P. A.
Attorneys At Law
1210 Arendell Street
Morehead City, N. C.28557
Telephone (919) 726-5164

Respectfully Submitted,
this 8th day of April, 1983.

Neil B. Whitford

STATEMENT OF FILING

The undersigned upon being sworn, does depose and say that:

1) He is a member of the Bar of the Supreme Court of the United States of America.

2) On April 24, 1983, within the time allowed for filing, the undersigned did deposit in a United States Post Office or mail box, with first class postage prepaid, forty (40) copies of this Juridictional Statement in a wrapper or wrappers addressed to:

The Honorable Alexander L. Stevas, Clerk
United States Supreme Court
1 First Street, N. E.
Washington, D. C. 20543

3) On April 24, 1983, the undersigned did serve counsel for the plaintiff-appellee with three (3) copies of this Jurisdictional Statement by depositing the same in a United States Post Office with first class postage

prepaid,in a wrapper or wrappers addressed to:

L. Patten Mason, Esq.
Mason & Phillips, P. A.
Attorneys At Law
1210 Arendell Street
Morehead City, N. C. 28557

Neil B. Whitford
Cooper and Whitford
P. O. Box 99
Atlantic Beach, N. C. 28512
Telephone: (919) 726-2865

Sworn to and subscribed
before me this 7 day
of [illegible], 1983.

Notary Public

CHRISULA DiRUSSO
NOTARY
PUBLIC
CARTERET COUNTY, N.C.

My Commission Expires: 11/1/86.